No. 70006-5

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 19,

Appellant,

v.

CITY OF SEATTLE, a Washington municipal corporation; and KING COUNTY, a Washington county,

Respondents,

And

WSA PROPERTIES, III, LLC, a Delaware limited liability company, dba ArenaCo,

Necessary Party.

APPELLANT'S MOTION TO ACCELERATE BRIEFING SCHEDULE AND APPELLATE REVIEW

I. INTRODUCTION

This State Environmental Policy Act ("SEPA") appeal arises out of the proposed construction of a publically-financed arena in Seattle's SODO port and industrial district. Appellant International Longshore and Warehouse Union Local 19 ("ILWU"), plaintiff below, consists of thousands of union longshore workers at the Port of Seattle who fear that

the traffic congestion and real estate gentrification generated by this arena will injure the environmental quality of the places where they live and work and will further diminish the economic viability of the Port, their economic livelihood.

ILWU will argue on appeal that the King County Superior Court erred in ruling on summary judgment that Seattle and King County did not violate SEPA by entering into a Memorandum of Understanding ("MOU") on December 3, 2012. While it purported only to start a SEPA EIS "process" and to be site-neutral, the MOU and the political circumstances surrounding its execution reflect that the proposed SOD arena's SEPA alternative site process will be a sham.

The legal issue in this appeal is whether the MOU was an "action" or "decision" for purposes of the various SEPA timing regulations and policies that prohibit agencies from taking "actions" or making "decisions" that are "commitments to a course of action" or which "limit the choice of reasonable alternatives" *before* an environmental impact statement ("EIS") is prepared.

Accelerated review of this case is in the interest of justice for two principal reasons. First, it would forestall continued public investment in an arena EIS process that may ultimately prove flawed from its inception. The MOU anticipates the Respondents will take multiple incremental

steps in furtherance of the SODO-sited arena, including designing a building for the SODO site, completing Seattle's design approval review process for a SODO building, WSA's purchasing of a professional basketball team and seeking approval from the NBA for the team's transfer to Seattle and later move into a SODO-sited arena, and the negotiation and drafting of final transaction documents that pertain only to a SODO arena. Accelerated review is necessary so that these steps do not create additional pre-SEPA momentum in favor of the SODO alternative and in violation of Washington Supreme Court's precedent requiring SEPA review "at the earliest possible stage."

Second, accelerated review is necessary to protect ILWU's ability to effectively enforce SEPA and to prevent the appeal from becoming moot. If accelerated review is *not* granted, it is possible that the EIS will be completed and the Councils will vote on it *before* this case is heard on appeal. This would likely prompt a defense motion to dismiss for mootness. If this motion is granted, ILWU's legal options under SEPA would be limited to a lawsuit challenging the arena EIS as "inadequate," a claim that may not account for the important timing and alternative momentum-building SEPA violations presented in this case.

II. IDENTITY OF MOVING PARTY

International Longshore and Warehouse Union, Local 19, Appellant, asks for the relief designated in Part III.

III. STATEMENT OF RELIEF SOUGHT

ILWU asks this Court to accelerate this appeal pursuant to RAP 18.12 and 18.18. Acceleration is in the interest of justice because the defective EIS process triggered by the MOU is moving forward concurrently with this appeal to the detriment of ILWU and the general public, the legal issue in this case is legally straight-forward, there are no facts at issue, and the parties have extensively briefed the SEPA issue before the Superior Court in summary judgment proceedings. A proposed briefing schedule is set forth in Section VI below.

IV. FACTS RELEVANT TO MOTION

Respondent WSA, through its principal, Chris Hansen, secretly approached the Mayor of Seattle in Spring 2011 with a proposal to enter into a public-private partnership for the construction and operation of an approximately $500 million publically-owned sports and entertainment arena in the SODO neighborhood of Seattle. The arena would house Mr. Hansen's newly-acquired professional basketball team and perhaps a National Hockey League team. Without any formal consideration of the environmental and economic impacts of such a proposal on the Port and

the SODO industrial area, Seattle, and eventually King County, launched into an intensive series of confidential negotiations, which ultimately led to the Seattle City Council and King County Council authorizing, by ordinances, the Mayor of Seattle and King County Executive to enter into a binding MOU with WSA. The Mayor and Executive signed the MOU on December 3, 2012.[1]

While it formalistically commits Seattle and King County to prepare an EIS, an economic impact statement, and to consider at least one alternative site for the arena (at the Seattle Center) before their respective councils "decide whether it is appropriate to proceed with or without additional or revised conditions,"[2] the MOU put into effect multiple provisions that both circumscribe the scope of the arena EIS and create overwhelming momentum in favor of WSA's preferred SODO location. For example, the MOU:

- Mandated WSA, with assistance from Seattle, to commence designing the SODO arena.[3]
- Mandated WSA, with the assistance of Seattle, to obtain "design review" approval of the SODO arena under Seattle land use codes.[4]

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[1] The December 3, 2012 MOU is attached as Exhibit 1to the Declaration of Peter Goldman.
[2] MOU, at 34 (§24b.).
[3] MOU, at 22 (§16).
[4] MOU, at 2 (§4).

- Required WSA to seek the NBA's approval of the SODO-sited arena for purposes of obtaining NBA approval to transfer a team from a different city.[5]

- Presumed that the only other alternative site that would be considered in the EIS would be at the Seattle Center.[6]

- Not expressly giving Seattle or King County the ability to site the arena elsewhere but only giving them the right to "decide whether it was appropriate to proceed with new or additional conditions" after a final EIS was prepared.[7]

- Authorized Seattle and King County to commence preparing final transaction and "umbrella" documents in anticipation of the final Council decision siting the arena in SODO.[8]

- Made WSA reimbursements for certain Seattle and King County "development costs" (up to $5 million) contingent upon Council approval of the SODO site.[9]

ILWU challenged the MOU under SEPA in a Declaratory Judgment action filed in King County Superior Court on October 18, 2012. The lawsuit alleged that the MOU violated two key SEPA timing provisions: WAC 197-11-070(1)(b), which prohibits agencies from taking "actions concerning the proposal" that "limit the choice of reasonable alternatives" and WAC 197-11-055(2)(c), which provides that, "appropriate consideration of environmental information shall be completed before an agency commits to a particular course of action."

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[5] MOU, at 24 (§16d.).
[6] MOU, at 3 (§5).
[7] MOU, at 34 (§24b.).
[8] MOU, at 3(§7).
[9] MOU, at 2 (§3b.); at 33-35 (§§24, 25).

ILWU filed a motion for summary judgment to declare that the MOU violated SEPA and to enjoin the Defendant's use of it in the SEPA process, which the trial court heard on February 22, 2013.

The trial court denied ILWU's motion for summary judgment and granted Seattle, King County, and WSA's cross-motions for summary judgment. Goldman Decl. Exh. 2. The court ruled that the legislatively-approved MOU was not an "action" or "decision" under SEPA because the Councils would vote in the future (after the EIS was completed) whether it was "appropriate to proceed." The trial court rejected ILWU's argument that the MOU was an "action" ripe for SEPA review because it was, under the totality of the circumstances, an action or decision that would "snowball" under the rationale of King County v. Boundary Review Bd., 122 Wn.2d 648, 860 P. 2d 1024 (1993) and other SEPA cases. A copy of the transcript of the summary judgment hearing is attached hereto. RP 52-54 (Goldman Decl. Exh. 3).

V. ARGUMENT IN SUPPORT OF ACCELERATED REVIEW

The Court may, on its own motion or on motion by a party, set any review proceeding for accelerated disposition. RAP 18.12. The Court has broad discretion to expedite briefing and review in order to serve the ends of justice. RAP 18.8(a). RAP 1.2(a) additionally provides that "[the RAPs] will be liberally construed to promote justice. The Courts of Appeal have

held that accelerated review is appropriate where the petitioner's concerns may become moot with the passage of time in a regular appeal, Puget Sound Power & Light Co. v. Public Utility Dist. No. 1, 17 Wash. App. 861, 862 n. 1, 565 P.2d 1221 (1977), and where speedy resolution would minimize the harm of correcting a judicial error, In re Custody of Osborne, 119 Wash. App. 133, 148 n. 8, 79 P.3d 465 (2003) (in context of custody proceedings).

There are at least two compelling reasons why accelerated review of this case is necessary, appropriate, and in the interest of justice.

A. Accelerated Review Is Necessary To Protect ILWU's Right to Enforce Crucial SEPA Timing Regulations and Common Law SEPA Anti-"Snowballing" Principles.

ILWU's SEPA challenge was based on Seattle and King County's violation of SEPA's timing provisions; accordingly, timing is of the essence in this appeal. ILWU's lawsuit alleged that the MOU went too far under SEPA in steering this public project to a specific geographic location because it was an "action" or "decision" that would, and was indeed intended to, generate unstoppable momentum in favor of WSA's preferred SODO site. Accelerated review is necessary to prevent Respondents from taking further action based on the MOU, generating more momentum for the SODO site, and compounding the SEPA timing violation.

ILWU argued that, although it purported only to set-up a SEPA process and was site-neutral, the MOU violated the "snowballing" principle set forth in Boundary Review Bd., which is as follows:

> One of SEPA's purposes is to provide consideration of environmental factors at the earliest possible stage to allow decisions to be based on complete disclosure of environmental consequences. Decision-making based on complete disclosure would be thwarted if full environmental review could be evaded simply because no land-use changes would occur as a direct result of a proposed government action. Even a boundary change, like the one in this case, may begin a process of government action which can "snowball" and acquire virtually unstoppable administrative inertia. Even if adverse environmental effects are discovered later, the inertia generated by the initial government decisions (made without environmental impact statements) may carry the project forward regardless. When government decisions may have such snowballing effect, decision-makers need to be apprised of the environmental consequences *before* the project picks up momentum, not after.

King County v. Boundary Rev. Bd., 122 Wn.2d at 664.[10]

Accelerated appellate review is necessary to ensure that the "snowballing" of the SODO arena project's momentum relative to the SODO site does not continue during the pendency of this appeal. As set forth above, over the next few months the MOU expects and requires

[10] The trial court held that Boundary Review Bd.'s "snowballing" principle did not apply to this case because the MOU was not a final "action" or "decision." The court reasoned that the MOU was not final because it was subject to a future council vote and because Justice Utter's use of the "snowballing" term in that case was "inartful" to the extent it implied "snowballing" applied to contingent preliminary legislative decisions. Goldman Decl. Exh. 3 (RP 52-54). Appellants do not address the merits of this ruling in this motion.

WSA and Seattle to obtain design review approval of a SODO arena, to obtain NBA approval for a team to move to Seattle and play in the SODO arena after spending several years in the Key Arena, and to prepare key financing and transaction documents for a SODO-sited arena. The MOU even purports to limit SEPA's mandate that public projects consider all "reasonable" alternative sites[11] by suggesting that only one alternative site—at the Seattle Center—will be considered. While, at least theoretically, the Councils might decide not to proceed with a SODO-sited arena for environmental or economic reasons, the MOU's "recruit a team based on a SODO-sited arena" approach was a critical pre-SEPA step which, if permitted to continue while this appeal is pending, will continue to "snowball" and make the SODO location a virtual certainty. This is particularly so because WSA will have spent a fortune in reliance on the MOU (designing an arena, purchasing an NBA team for over half a billion dollars) and because the MOU intentionally makes whether or not the Sonics will return to Seattle hinge on whether the Councils approve an arena in SODO.

Accelerated review is necessary and in the interest of justice because it will allow this Court to declare the MOU in violation of SEPA *before* the momentum for a SODO location grows even more

[11] Weyerhaeuser v. Pierce Cy., 124 Wn. 2d 26, 41, 873 P. 2d 498 (1994).

insurmountable. Even if this Court ultimately affirms the trial court's summary judgment ruling, accelerated review will benefit the public and government by providing a stable legal footing for the MOU's expensive and time-intensive SEPA process.

B. Accelerated Review Is Necessary to Avoid Possible Mootness and to Prevent Further Investment of Public and Private Resources in a Fundamentally Flawed SEPA Process.

Without accelerated review, it is possible—even likely—that the EIS will be completed and the Council will have voted on the final arena location *before* this appeal is heard and/or decided. See Goldman Decl. Exh. 4 (official Seattle timetable for final EIS is mid-November, 2013). A SODO arena EIS and subsequent council vote that "laps" this appeal would produce three outcomes that manifestly prejudice ILWU's right to enforce SEPA relative to a publicly-financed project that will directly affect their environmental and personal economic interests.

First, it would potentially render the appeal moot. This alone is a reason to accelerate, at least in Division Three. Puget Sound Power & Light Co., 17 Wn. App. at 862 n. 1.[12]

Second, if this appeal was dismissed for mootness, it would effectively deprive ILWU of their right to challenge the integrity of the

[12] For various reasons beyond the scope of this Motion, Petitioners do not concede that the completion of an EIS or a Council vote on it would moot this case. But the probability of a motion to dismiss based on mootness is high.

SEPA process leading up to the Council vote in favor of a SODO-sited arena. To be sure, any person or organization with standing can judicially challenge the final arena EIS after the Council votes in favor of the SODO location based on its *inadequacy*. RCW 43.21C.075. But an adequacy challenge does not provide forward-looking declaratory or injunctive relief as would this case. An adequacy challenge asks whether the EIS was legally inadequate as a matter of law under the "rule of reason," Cheney v. Mountlake Terrace, 87 Wn.2d 338, 344-45, 552 P.2d 184 (1976), and whether the EIS presented decision-makers with a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the agency's decision. Klickitat County Citizens Against Imported Waste v. Klickitat Cy., 122 Wn.2d 619, 633, 860 P.2d 390, 860 P.2d 1256 (1993). But an adequacy challenge does not necessarily look at whether key *pre*-SEPA decisions (such as the MOU here) affected the *integrity* of the SEPA process and the subsequent government agency vote; instead, adequacy only asks whether the EIS "provide[s] sufficient information to allow officials to make a reasoned choice among alternatives." Solid Waste Alternative Proponents v. Okanogan County, 66 Wn. App. 439, 442, 832 P.2d 503 (1992).[13]

[13] If a future adequacy lawsuit is necessary, ILWU will advance all permissible arguments that the MOU tainted the EIS. But, as reflected in the cited cases, EIS "adequacy" challenges have limitations and are deferential to agency discretion.

Here, a potential future challenge to the legal adequacy of the EIS may consider only the contents of the SODO arena EIS and not afford ILWU the direct opportunity to litigate whether the MOU violated SEPA and whether, as a matter of law, this violation irreparably tainted the on-going arena EIS process and government agency vote. A challenge to the adequacy of an EIS, moreover, will not provide a judicial *declaration* that the SEPA process in this case was tainted by the MOU, a judgment which could correct the SEPA error before the EIS was complete and Council votes are taken. Nor would an adequacy challenge enjoin Seattle or King County's reliance on the MOU for purposes of the SEPA process. While ILWU would oppose this argument, it is also conceivable that the Respondents will, in a future EIS adequacy lawsuit, characterize the SEPA-violating MOU as harmless procedural error that is not "consequential" in light of the completion of the EIS. See Mentor v. Kitsap Cy., 22 Wn. App. 285, 290-91, 588 P.2d 1226 (1978). ILWU will also be prejudiced at the EIS adequacy stage because an agency's determination that an EIS is "adequate" is accorded substantial weight. RCW 43.21C.090.

Finally, accelerated appellate review will promote both legislative and judicial economy. If the appellate court hears this case on its regular appellate track, it is possible that the legally-flawed MOU will render the

EIS process null and void after the public agencies and private individuals have spent months and millions of dollars participating in a fatally-flawed EIS process. This would amount to a vast waste of time and public and private resources.

VI. CONCLUSION

It should be in the interest of all parties to reach a prompt determination of the legality of the ongoing arena SEPA process prior to additional investment of public resources in the SODO arena's EIS process. ILWU respectfully requests the Court to grant its motion to accelerate review of this appeal. ILWU proposes that the Court direct ILWU to file its opening brief by April 18, 2013, for Respondents to file their response briefs by May 17, 2013, and for ILWU to file its reply brief by May 31, 2013. No extensions of time should be granted absent compelling circumstances. ILWU also respectfully moves the Court to assign the case to the next available panel of judges as soon as possible.

Dated this 29th day of March, 2013.

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